

NORTHWEST PIPELINE CORP.
(ON RECONSIDERATION)

IBLA 81-941, et al.

Decided October 18, 1984

Reconsideration and clarification of the Board's decision in Northwest Pipeline Corp. (On Reconsideration), 77 IBLA 46 (1983), on appeal from decisions of the New Mexico, Colorado, and Wyoming State Offices determining annual rental charges for natural gas pipeline rights-of-way. NM 43325, et al.

Prior Board decision reaffirmed and clarified.

1. Appraisals -- Rights-of-Way: Generally -- Rights-of-Way: Act of February 25, 1920 -- Rights-of-Way: Oil and Gas Pipelines

Where the Bureau of Land Management proposes to resolve the conflicts and inconsistencies in its appraisal method used to determine fair market rental values for natural gas pipeline rights-of-way, granted pursuant to the Act of Feb. 25, 1920, as amended, 30 U.S.C. § 185 (1982), the Board will not rule on the legality of the going rate method of appraisal, since the Bureau of Land Management should be allowed to explore the full range of options available in developing the proper appraisal method.

2. Appraisals -- Rights-of-Way: Generally -- Rights-of-Way: Act of February 25, 1920

During the interim period until the Bureau of Land Management develops an approved appraisal method to determine fair market value for natural gas pipeline rights-of-way, new rights-of-way should not be appraised using the going rate method of appraisal. The Bureau of Land Management should proceed to charge a reasonable estimate of the fair market value subject to subsequent appraisal in accordance with 43 CFR 2803.1-2(b).

3. Appraisals -- Rights-of-Way: Generally -- Rights-of-Way: Act of February 25, 1920

During the interim period until the Bureau of Land Management develops an approved appraisal method to

determine fair market value for natural gas pipeline rights-of-way, reappraisal of existing rights-of-way should be deferred, and the Bureau of Land Management should continue to charge the original rental fee or last uncontested rental fee.

APPEARANCES: James M. Day, Esq., William J. Slosberg, Esq., Washington, D.C., for Northwest Pipeline Corporation; A. Scott Loveless, Esq., Office of the Solicitor, Washington, D.C., for the Bureau of Land Management; Guy R. Martin, Esq., and Robert F. Bauer, Esq., Washington, D.C., for intervenor.

OPINION BY ADMINISTRATIVE JUDGE HARRIS

On December 1, 1983, Northwest Pipeline Corporation (Northwest) filed a petition for clarification of this Board's decision in Northwest Pipeline Corp. (On reconsideration) (Northwest II), 77 IBLA 46, issued on November 1, 1983. In that decision the Board set aside its prior decision in Northwest Pipeline Corp. (Northwest I), 65 IBLA 245 (1982), and set aside the underlying Bureau of Land Management (BLM) decisions and remanded the cases on appeal. In Northwest II we found that BLM had acknowledged Northwest's contention that BLM had conflicting and inconsistent appraisal practices for determining fair market rental values for natural gas pipeline rights-of-way granted pursuant to the Act of February 25, 1920, as amended, 30 U.S.C. § 185 (1982). The remand was to allow BLM to apply appraisal methods adopted following the completion of a report to be prepared by a BLM study team formed to address the appraisal problem. The Solicitor filed no response to the petition for clarification.

Prior to the filing of the petition for clarification, the Director, Office of Hearings and Appeals, on November 15, 1983, directed this Board to stay all substantive action on any natural gas pipeline appeals then pending before the Board or subsequently filed with it. this directive necessarily precluded action on the petition.

On May 18, 1984, the Director ordered the Board "to reconsider and clarify said decision [Northwest II, supra] after giving both parties every opportunity to brief their positions." On May 22, 1984, the Board issued an order establishing a briefing schedule for the parties. By order dated June 5, 1984, the Board granted a motion filed by El Paso Natural Gas Company (EPNG) on May 30, 1984, requesting the opportunity to intervene in this case because it has similar appeals pending before this Board.

Northwest in its original petition for clarification objected to BLM's continued use of the going rate method of appraisal following the Board's November 1, 1983, decision. It stated that with regard to new rights-of-way BLM should only be allowed to collect a minimum rental of \$25 per 5 years in accordance with the BLM Manual until BLM adopted a proper appraisal system. Northwest claimed that following adoption of the system the annual rental fee could be adjusted in accordance with 43 CFR 2803.1-2(b) (Petition at 3).

With regard to reappraisals Northwest asserted that BLM should be pre-cluded from reappraising and increasing rental fees until such time as it

adopted its uniform appraisal method. Northwest pointed out that the requirement of reappraising a right-of-way every 5 years is a regulatory one and has no statutory counterpart.

Northwest argued that the Board erred in failing to set out guidelines regarding the propriety of the going rate versus comparable sale approach and rules relating to the admissibility of sales subject to eminent domain. Northwest asserted that failure to clarify the decision would result in delayed resolution of the issues.

In response to the Board's May 22, 1984, order Northwest did not amplify the arguments made in its petition, although it reserved the right to do so after reviewing the submissions of BLM and EPNG.

BLM's response to the briefing order was a motion to remand the case. Counsel for BLM stated that the case could be "best handled through remand to the Bureau, as initially proposed in the Board's decision on rehearing, 77 IBLA 46 (1983)." He stated that remand "would avoid wasting the Board's time considering issues arising from procedures that BLM admits were nonuniformly applied and inconsistent and is itself reexamining." Counsel further states that BLM's notice of intent to propose rulemaking is evidence that it has not yet adopted a final position on the subject of right-of-way appraisals. 1/ BLM disagreed that "clarification" of issues was necessary, stating that in essence Northwest was seeking only an advisory opinion from the Board. BLM stated that it is not the function of the Board to offer advice and guidelines for speculative actions. BLM points out that supplemental issues such as fees due in the interim, the date from which new fees should begin to accrue, and the rights-of-way to which reappraisals should apply should be left to BLM to deal with on remand.

In its July 2, 1984, brief, EPNG states that the Board should rule that the going rate method of appraisal is unlawful. It argues that BLM's publication of its intent to propose rulemaking does not obviate the necessity for Board action. It further contends that the withheld payment agreement between EPNG and the Department likewise does not moot the necessity for a ruling on the going rate method. 2/

In its August 6, 1984, brief Northwest opposes BLM's motion to remand. Northwest asserts that, contrary to BLM's contention, clarification of certain issues is necessary. It alleges injury to itself and its consumers because, it argues, BLM continues to appraise new rights-of-way and collect

1/ The notice referred to is BLM's "Notice of Intent to Propose Rulemaking" published in the Federal Register on May 4, 1984 (49 FR 19049). In this notice BLM requested "suggestions from the public in developing and reviewing possible methods for establishing fair market annual rental" for rights-of-way.

2/ In its motion to intervene EPNG had stated that it had reached an agreement with the Department whereby it had taken an indemnity bond to secure ultimate payment of disputed rental charges. In its brief EPNG states that although it has secured the bond and forwarded it to the Department, it has not received formal Departmental approval.

rentals based on the going rate method. Northwest further indicates that clarification may eliminate some delay in final resolution of the appraisal question because Northwest believes that BLM's rulemaking and study team report will be little more than a veiled attempt to justify its going rate approach.

Northwest also expands on parts of its arguments set forth in its petition. With regard to appraisals for annual rental, it asserts that BLM's use of the "going rate" to "estimate" the appraised annual fair market value on new rights-of-way is improper and contrary to the BLM Manual. Northwest points out that 43 CFR 2803.1-2(b) provides that:

(b) To expedite the processing of any grant or permit pursuant to this part, the authorized officer may establish an estimated rental fee and collect this fee in advance with the provision that upon receipt of an approved fair market value appraisal the advance rental fee shall be adjusted accordingly. [3/]

It is impossible to make a reasonable estimate, Northwest argues, unless BLM has a valid "approved appraisal approach." In the absence of a reasonable estimate the position of Northwest is that BLM should use the minimum rental of \$25 per 5-year term as established in the BLM Manual. Northwest states again that after adoption of an approved appraisal approach, BLM may adjust the annual rental fee in accordance with 43 CFR 2803.1-2(b).

With respect to rental reappraisals, Northwest complains that BLM allows rental adjustments to be determined using the going rate in accordance with Instruction Memorandum (IM) 84-490, dated May 12, 1984. 4/ However, it asserts that lack of uniformity continues because IM 84-490 is not being followed in all state offices. In support of this assertion Northwest provides evidence in the form of copies of rental adjustment decisions issued to it that the IM 84-490 procedures are being followed in Wyoming when the going

3/ The regulation governing rental payments for natural gas pipeline right-of-way, 43 CFR 2883.1-2, simply states that rental payments shall be made in accordance with 43 CFR 2803.1-2. Thus, the rental payment sections in 43 CFR Part 2800 are controlling for purposes of natural gas pipeline rights-of-way.

4/ IM 84-490 provides guidance where rental readjustments are determined for linear rights-of-way through the use of the going rate method of appraisal. Therein, BLM outlined two options available to a right-of-way holder: "1) Pay the adjusted rental under protest and appeal, or 2) Pay the 'old' rental due, file an appeal (together with statement of reasons), and request a Secretarial waiver for the disputed rental pending the outcome of the appeal process." BLM stated further, however, that a right-of-way holder would only be advised of these options in the rental adjustment decision "[w]here a State anticipates issuing ten or more rental adjustment decisions held by any one individual or company." A determination on whether or not to grant a waiver is to be made by the Assistant Secretary, Land and Minerals Management. The IM provides no guidelines on how such a determination would be made nor does it explain why a right-of-way holder would only be notified of the available options if it held ten or more rights-of-way.

rate is used (Exh. C, Northwest's Aug. 6, 1984, brief), but not in New Mexico (Exh. D, Northwest's Aug. 6, 1984, brief). Northwest points to 43 CFR 2803.1-2(d) and contends that it requires that adjustments in rental rates must be based on an appraisal. ^{5/} It argues that BLM may not make an appraisal until it develops a proper appraisal method, and for that reason, it cannot "reappraise" a right-of-way. Present rental increases, Northwest claims, are being imposed based on "estimated rental charges based on the going rate method" (Exh. G, Northwest's Aug. 6, 1984, brief) or on an "estimated rental" without explanation (Exh. H, Northwest's Aug. 6, 1984, brief). BLM should be limited to charging annual rental fees based on the original or previous valid appraisal, Northwest asserts.

EPNG also opposes BLM's motion for remand. It claims that BLM seeks to avoid full Board review of the issues without coming forward with any legal arguments whatsoever in support of its position. EPNG again reiterates its argument for a clear Board ruling that BLM's going rate decisions to date have been contrary to law and without any legal force and effect. EPNG believes that remand without a going rate ruling is likely to lead to "no more than a restitution of the going rate methodology perhaps with greater procedural flourish." (EPNG's Reply to Motion to Remand at 2).

BLM has filed no response to the arguments raised by Northwest and EPNG in their briefs.

[1] We turn to consideration of the issues raised by Northwest and EPNG. First, we will deal with the assertion by both Northwest and EPNG that we must rule on the legality of the going rate method. EPNG specifically seeks a ruling that the outstanding BLM going rate determinations applicable to EPNG's pipeline rights-of-way are illegal. Northwest requests that the Board rule that BLM is precluded from estimating or appraising right-of-way rentals based on the going rate and that BLM must use the before and after method of appraisal.

In Northwest II we did not rule on the legality of the going rate method, nor do we intend to do so here. In that decision, after stating the rationale for setting aside the BLM decisions, we set forth the contemplated procedure:

When the study team has completed its work and the appraisal method and its application has been adopted by BLM, the three State offices whose cases are before us in these appeals should review the cases we are remanding and apply the approved appraisal approach to those cases. Appellant will have the right to appeal those decisions at that time.

Northwest II, supra at 50. Our intent was to allow BLM to have a full range of options in developing a proper appraisal method. We did not rule there

^{5/} Both Northwest and EPNG direct our attention to A. Keith Barben, 81 IBLA 332 (1982), a right-of-way appraisal case in which the Board held that a rental adjustment of a water pipeline right-of-way had to be supported by an appraisal.

that the going rate was proper or improper. 6/ However, in Northwest I we had endorsed the going rate method as an appropriate appraisal methodology for assessing fair market value for linear rights-of-way, as well as ruling that BLM's 30 percent downward adjustment had not been shown to be in error. The fact that we set aside that decision in Northwest II should not be construed as a rejection of a going rate approach, but rather as a recognition of the disclosure of inconsistencies in BLM's appraisal procedures.

Both Northwest and EPNG argue strenuously that a legal ruling now will shorten the time necessary to reach a final conclusion on the appraisal question and that BLM's contemplated procedures are preordained to result in adoption of the going rate method. We disagree. BLM has issued its notice of intent to propose rulemaking. The clear import of BLM's motion for remand is that BLM intends to follow through on its rulemaking efforts on this issue. 7/ Thus, Northwest and EPNG have had the opportunity to comment on the notice of proposed rulemaking. Likewise, they will have the opportunity to comment on the proposed regulations. BLM should not be precluded from exploring all methodologies for arriving at fair market value. However, we would recommend that in preparation for its rulemaking effort that BLM, with the counsel of the Solicitor's Office, carefully analyze the legal arguments presented in this case challenging the going rate method.

We deny Northwest's and EPNG's request to rule on the legality of the going rate method of appraisal.

Next, we turn to the concerns addressed by Northwest with respect to appraisals and reappraisals during the time that BLM is developing the proper appraisal method. BLM says that these "supplemental issues" can be dealt with by BLM "in its own reconsideration of these cases" (Motion to Remand at 2). 8/ While BLM may be able to do so, we believe that clarification of our Northwest II decision might help to alleviate some of the problems that have been highlighted by Northwest, as having arisen since our decision in Northwest II in November 1983.

[2] First, we will examine the issue raised by Northwest concerning annual appraisals for new rights-of-way. As pointed out above, the Board did not rule one way or the other on the propriety of the going rate method in Northwest II. Our decision was prompted by BLM's admission that it had

6/ We merely set aside the BLM decisions to await the study team results. Clearly, if as a result of that study BLM adopted the same appraisal procedure, including the same downward adjustment that had been utilized in the previous appraisals, BLM could conceivably reinstate its earlier decisions. Such decisions, however, would again be subject to appeal.

7/ BLM states in its motion to remand at page 3: "It is entirely possible, if all interested parties participate in the proposed rulemaking in a meaningful way, that there will be no case or controversy to be appealed."

8/ Counsel for BLM announces BLM's willingness to discuss these issues with Northwest, as it has with El Paso, to "work out an acceptable interim procedure" (Motion to Remand at 2 n.2). Northwest, however, recounts in its Aug. 6, 1984, brief its previous unsuccessful attempt to reach agreement with BLM on certain issues in this case.

inconsistently applied its appraisal methods, and that even state offices which applied the going rate method were varying the amounts of their downward adjustments. Those facts, coupled with BLM's assemblage of a study team, were the bases for the Board's action. At that time the Board made no statement concerning future appraisals or reappraisals, except to indicate that the remanded cases should be conformed to the adopted appraisal method.

Northwest now has provided evidence that BLM is continuing to appraise new rights-of-way using the going rate method. The Board did not contemplate that, after Northwest II and prior to adoption of a proper appraisal method, BLM would continue to assess annual rental for new rights-of-way in accordance with the going rate method. The going rate method is the method which has been challenged in the numerous appeals filed with the Board, and as a result of its use, BLM is completely reexamining its linear right-of-way appraisal system. BLM has admitted that when the going rate has been used, it has not been applied in a consistent fashion. Moreover, BLM has now asserted that remand in accordance with Northwest II is the proper action in this case. Thus, continued use of this method, which results in the highest rental fees, may require, if BLM adopts a procedure other than the going rate, the refund of substantial amounts of money and the reappraisal of all the rights-of-way in question in accordance with the approved methodology. ^{9/}

We find that continued use of the going rate is inconsistent with our Northwest II decision which set aside decisions that utilized the going rate method and directed that BLM await adoption of an appraisal system before appraising those rights-of-way. Until it has an approved appraisal method BLM should not appraise new rights-of-way based on the going rate. BLM decisions utilizing the going rate in such cases are subject to being set aside and remanded in accordance with the reasons set forth herein and in Northwest II.

As pointed out by Northwest, the regulations relating to the granting of rights-of-way provide for the collection of an estimated rental subject to subsequent adjustment following appraisal. Northwest asserts that without an approved appraisal method, it is impossible to establish an estimated rental value and that BLM may only require the minimum rental of \$25 for 5 years.

Even though BLM has not adopted a uniform appraisal method, we do not believe that stands as a bar to establishment of an estimated rental. Such an estimate should be reasonable, however, and should not be based on the method that results in the highest value -- i.e., the going rate. Likewise, we see no reason why the estimate must be in all cases, as Northwest insists, the absolute minimum of \$25 for 5 years. BLM should be free to establish a reasonable estimate of the value of a new right-of-way. ^{10/} A right-of-way,

^{9/} In the notice of intent to propose rulemaking BLM states that: "The 'going rate' method has received the greatest amount of criticism since it has resulted in sharply higher rental payments." 49 FR 19050 (May 4, 1984).

^{10/} A reasonable estimate of the fair market value need not be based on an actual appraisal. The regulation contemplates that an estimated amount be collected in lieu of awaiting an appraisal in order to expedite the issuance of rights-of-way. In this regard BLM might collect a flat fee such as \$50, \$100, \$200, etc., subject to later adjustment.

when issued, could include language that the grant is subject to the express covenant that any further rental due as a result of an appraisal conducted following adoption of an approved appraisal method shall be paid upon request. See Lone Star Steel Co., 79 IBLA 345 (1984); 43 CFR 2803.1-2(b). On the other hand, should the estimated rental that is collected be greater than the ultimate appraised value, the grantee would be entitled to a refund.

[3] Northwest has also raised an issue concerning BLM's reappraisals during this interim period. Northwest points to IM 84-490 as establishing certain policies for BLM regarding rental adjustments or reappraisals. Northwest complains that the IM is improper and that it allows adjustments to be determined on the basis of the going rate method. Further, Northwest contends that even if it were proper, the state offices have not uniformly adopted it. Northwest contends that BLM should be limited to charging annual rental based on the original or previous valid appraisal, since it presently has no proper appraisal method.

Despite the fact that IM 84-490 allows the use of the going rate in establishing rental adjustments, that document is not binding on the Board. See American Telephone & Telegraph Co., 77 IBLA 110, 117 n.4 (1983). As we stated above, during the interim period until adoption of an approved appraisal procedure, BLM should not employ the going rate appraisal method in calculating new rental rate charges. The reasons given for that finding are equally applicable with respect to rental adjustments.

In addition, 43 CFR 2803.1-2(d) provides that rental fees may be adjusted "whenever necessary to reflect current fair market value: (1) As a result of reappraisal of fair market values which shall occur at least once every 5 years." (Emphasis added.) Recently, the Board held with regard to a rental adjustment for a water pipeline right-of-way that the decision adjusting the rental should be reversed because there was no appraisal in accordance with 43 CFR 2803.1-2(d). A. Keith Barben, *supra* at 336. 11/

At present BLM has no approved appraisal method. Northwest urges that under the circumstances BLM should only be allowed to charge an annual fee based on the original charge or previous valid appraisal. We must agree with Northwest that during the interim period the best course of action regarding rental adjustments is for BLM to continue to charge the original rental fee

11/ Northwest argues that two rights-of-way decisions involved in this case (NM-0134912 and NM-0121800) should be reversed for the reasons set forth in Barben because in both cases the "original rental charge" contained the statement, "This is not an appraisal * * *." The appealed BLM decisions concerning those rights-of-way were issued in 1981. The documents to which Northwest refers are each dated in 1976 and do not appear to relate in any fashion to the 1981 decisions. The 1976 documents merely reflect calculations relating to the per acre value of the acreage covered by the rights-of-way, the conclusions of which are that "an appraisal would not result in a rental charge greater than the regulatory minimum. Therefore, it is recommended that the rental fee be set at \$150 for a 30 year period." In 1981 the rights-of-way were reappraised using the going rate method. The 1976 documents provide no basis for reversing the 1981 decisions.

or last uncontested fee. By doing so, right-of-way holders are relieved from having to appeal rental adjustment decisions which are not properly supported by an approved appraisal method. ^{12/} BLM's time and resources are conserved since it need not undertake rental adjustments which would be subject to challenge and which in all likelihood would have to be repeated following adoption of the proper appraisal method. During the interim period BLM can give notice to right-of-way holders, pursuant to 43 CFR 2803.1-2(d)(1), that it will be adjusting rental fees subsequent to the adoption of its approved appraisal method. Continued use of the pipeline constitutes the holder's agreement to pay the full fair market rental value upon its final determination subject, of course, to the holder's right to appeal the determination as not representing fair market rental value. ^{13/}

The guidelines enunciated in this opinion should be applied during the interim period until an approved appraisal method is adopted. To the extent that BLM has previously collected rental fees in these and other appealed cases based on the going rate method, or the Department has entered into arrangements for payment in accordance with IM 84-490, our decision does not require refund of those monies. Collected fees should be held in escrow by BLM pending the adoption and application of its appraisal methodology.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, Northwest Pipeline Corp. (On Reconsideration), 77 IBLA 46 (1983), is reaffirmed and clarified as set forth in this opinion.

Bruce R. Harris
Administrative Judge

I concur:

Gail M. Frazier
Administrative Judge

^{12/} The necessity for safeguarding the rights of pipeline right-of-way holders is especially important in these cases because of the effect of 43 CFR 2804.1. That regulation states that right-of-way decisions are to be effective pending appeal and that 43 CFR 4.21(a), which is a general procedural regulation that stays the effect of decisions on appeal, does not apply to right-of-way decisions. Thus, BLM may charge any rental amount, and it must be paid before a right-of-way holder may get review of a decision.

^{13/} Payment of the old rental during development of a proper appraisal method cannot be construed as complete satisfaction of the right-of-way holder's obligation to pay fair market value.

ADMINISTRATIVE JUDGE BURSKI CONCURRING:

In our original decision (Northwest I, 65 IBLA 245 (1982)), we expressly held that the "going rate" method was an appropriate method for assessing fair market value for linear rights-of-way. We also held the specific "going rate" adjustment factors utilized by BLM, specifically, a 30-percent downward revision for the more limited nature of Government rights-of-way vis-a-vis non-Federal grants, had not been shown to be in error. It should also be recognized that, during the course of our analysis, we also stated that the "before and after" test was an appropriate method for determination of fair market value for linear rights-of-way.

In Northwest II, 77 IBLA 46 (1983), we set aside our first decision. Our action, however, was not predicated on a repudiation of the "going rate" system per se, but rather was based on the combination of appellant's allegations that some State offices of BLM were not following the going rate approach at all (and were, therefore, charging considerably less than the amount which would properly be chargeable under the going rate), while others were applying it inconsistently, together with Instruction Memorandum 83-836, which recognized the existence of these varying (and arguably inconsistent) approaches in the State offices and which set up a study group "to study and recommend an acceptable method for arriving at the estimated fair market annual rental for BLM R/W grants." (Emphasis in original.) In this regard, however, I think it important to emphasize a point expressly made in Northwest II: namely, that "either some state offices are accepting far more than fair market rental value, or some state offices are accepting far less than fair market rental value." 77 IBLA at 49 (emphasis supplied). In any event, for reasons which I will now explicate, I think that, to the extent that our decision in Northwest I recognized the "before and after" test as an appropriate mechanism for determining fair market rental value of linear rights-of-way, that decision was in error.

Initially, I think it important to recognize that one of appellant's arguments has a certain validity. Appellant notes that the "going rate" method of appraisal derives a value considerably in excess of that which is obtained by the "before and after" approach. Indeed, the empirical evidence on this point seems irrefutable. Appellant suggests that, while there may be different appraisal approaches which might be applied in any given situation, the values obtained should be relatively close since the end result of any appraisal should be fair market value. Thus, where two values are widely disparate, it is clear that one of them is not the fair market value. I think appellant is equally correct in this analysis. The problem which I have with appellant's argument lies in its ultimate conclusion, viz. that it is the going rate method which distorts fair market value. On the contrary, I think the empirical data which both BLM and appellant have provided establishes beyond cavil that the "before and after" test necessarily results in a valuation far below fair market value. The reason for this, I would suggest, is that the "before and after" test is simply not designed as a method for deriving "fair market value."

I fully recognize that a number of Board decisions, including some in which I have personally participated, have expressly held that the "before and after" test is a valid method of appraising linear rights-of-way. Most,

if not all, of these decisions have been premised on the provisions of the Uniform Appraisal Standards (UAS) adopted by the Interagency Land Acquisition Conference in 1973. Thus, the UAS stated that:

The preferred way to determine compensation in partial taking cases is by the "before and after" method. Under this method, which usually is the simplest approach, just compensation is arrived at by first estimating the market value of the entire unit before the taking and then subtracting from it the market value of what remains in the owner after the taking. The difference is compensation including both value of land taken and any diminution of value in the remainder. [Footnote omitted.]

UAS at 24-25.

Specifically with respect to easements and rights-of-way, the UAS provided:

When an easement or servitude over land is condemned for the public use, the appraisal should be in the amount of the difference between the fair market value of the land before and the fair market value immediately after the imposition of the easement. Full consideration should be given to and due allowance made for the substantial enjoyment and beneficial ownership remaining to the owner, subject only to the interference occasioned by the taking and exercising of the easement.

In the case of easements such as those acquired for domestic electric, telephone or cable lines, where there is an established going rate per pole and per-line mile, such transactions may be considered among other market data. In the absence of better evidence of market value, the "before and after" method discussed above should be employed.

UAS at 34. Based on this analysis, the Board has, in the past, stated that the "before and after" test is the preferred method for appraising grants of Government rights-of-way. See, e.g., Northwest I, supra at 250.

What the Board has tended to overlook, however, is that the UAS is designed as a standard to control Federal land acquisitions. Indeed, the actual title of the document is "Uniform Appraisal Standards for Federal Land Acquisitions." The situation in this Department is relatively unique in that, rather than being concerned with the acquisition of land or interests therein for which "just compensation" must be paid, the Department of the Interior is generally involved in the granting of interests in public land to private citizens, for which it is statutorily required to obtain "fair market" value. Our uncritical past assumption has been that the standards of compensation for a Government taking should be automatically applied in ascertaining the value to be assessed for a Governmental grant of the same type of interest. In this, we have implicitly held that "just compensation" under the Fifth Amendment is necessarily coincidental with "fair market value" as

arrived at in the market place. This assumption, I would suggest, is demonstrably false where applied to acquisitions and grants of less than a total fee interest in land.

The concept that private property will not be taken for public use absent the payment of "just compensation" is, of course, grounded in the Fifth Amendment. I recognize that the UAS declares that "[u]nder established law the criterion for just compensation is the fair market value of the property at the time of the taking" (UAS at 3). In this respect, it merely rephrases what a number of court cases have expressly stated. Thus, in United States v. Miller, 317 U.S. 369 (1943), the Supreme Court noted:

It is conceivable that an owner's indemnity should be measured in various ways depending upon the circumstances of each case and that no general formula should be used for the purpose. In an effort, however, to find some practical standard, the courts early adopted, and have retained, the concept of market value. The owner has been said to be entitled to the "value," the "market value," and the "fair market value" of what is taken. The term "fair" hardly adds anything to the phrase "market value," which denotes what "it fairly may be believed that a purchaser in fair market conditions would have given," or, more concisely, "market value fairly determined." [Footnotes omitted.]

Id. at 373-74. I think such statements, while perhaps true as a general proposition, are simply over-broad when one looks at the nature of court adjudications of "just compensation" in the context of a partial taking. ^{1/}

Federal courts have long recognized that nothing in the constitutional mandate that any taking of private property for a public use be compensated prohibits Congress from requiring in the determination of what compensation is "just" the factoring in of both consequential damages or residual benefits on land not subject to the Federal taking. See, e.g., United States v. Grizzard, 219 U.S. 180, 184-85 (1911). What has been only occasionally recognized, however, is that consideration of offsetting damages and benefits actually represents adjustments to the fair market value of the land or interests in the land that were subject to the taking. This point is readily apparent in the following example.

Let us assume a landowner owns a 100-acre parcel of farmland, not presently riparian, bearing an average market value of \$2,000 an acre. Pursuant to a Government flood control project, a dam is constructed downstream on a river which flows in the vicinity of appellant's land. As a result of this Federal project, however, the water impounded by the dam will inundate 50 acres of appellant's farmland and, thus, the landowner is properly owed compensation for this taking. It is easily computed that 50 acres at a price

^{1/} For purposes of convenience, I intend to use the term "partial taking" in the text to include both the taking in fee of a part of land which is properly deemed to be a single unit, as well as the taking of a lesser estate in a specific parcel of land.

of \$2,000 per acre results in a total of \$100,000. Is this, therefore, the value that will be paid to the landowner for the taking of his private property? Almost certainly not.

In a situation involving a partial taking for flood-control purposes, Congress has directed that, in assessing just compensation, the trier "shall take into consideration by way of reducing the amount of compensation or damages any special and direct benefits to the remainder arising from the improvement." Section 6 of the Act of July 18, 1918, 40 Stat. 911, 33 U.S.C. § 595 (1982). ^{2/} Thus, in the above hypothetical, the value of the land taken would be diminished by any appreciation in value flowing to the remainder still in the landowner's ownership which results from the project for which land was acquired. ^{3/} It is, indeed, possible that in such a situation, the newly acquired riparian frontage of the farmer's unappropriated acreage would cause its valuation to rise to \$4,000 an acre or more. In such a case, when the benefits accruing to the landowner were set off against the taking of his 50 acres, it could occur that the trier would determine that the landowner should be paid nothing. In other words, the landowner is justly compensated by the mere completion of the project without the payment of any further amount, as the value of his remaining land equated or exceeded the original value of all of his land. "Just compensation" in a monetary sense would be zero. This does not mean, however, that the "fair market value" of the land taken was zero. On the contrary, the "fair market value" remained \$2,000 an acre. Application of the benefits/damages test actually involves additions to and subtractions from fair market value in order to arrive at "just compensation."

This aspect of the benefits/damages test, while often unstated, has occasionally been expressly recognized. One of the most lucid discussions on this point appears in Bauman v. Ross, 167 U.S. 548 (1897). Therein, the Supreme Court quoted Chief Justice Cranch of the Court of Appeals of the District of Columbia declaiming on the nature of the just compensation mandated by the Constitution:

But the Constitution only provides for the general principle. The means of ascertaining the just compensation were left to be decided by the public authority which should give the power to take the private property for public use. All the States, prior to the adoption of the Constitution, exercised this right, and still continue to exercise it where it is necessary to condemn land for roads and other public uses; and they have generally provided for compensation through the intervention of a jury.

^{2/} While this provision is technically only applicable for projects improving rivers, harbors, canals, and waterways, it is made expressly applicable to flood control projects by section 6 of the Act of Aug. 18, 1941, 55 Stat. 650, as amended, 33 U.S.C. § 701c-2 (1982).

^{3/} It is also, of course, possible that additional severance damages could occur to the land retained because the flooding has made access difficult or impossible. In such situations, upward revisions of the compensation would be warranted. This is, however, merely the reverse side of the situation outlined in the text, and supports rather than undermines my analysis.

It is impossible for the legislature to fix the compensation in every individual case. It can only provide a tribunal to examine the circumstances of each case, and to estimate the just compensation. If the jury had not been required by the charter to consider the benefit, as well as the damage, they would still have been at liberty to do so, for the Constitution does not require that the value should be paid, but that just compensation should be given. Just compensation means a compensation that would be just in regard to the public, as well as in regard to the individual; and if the jury should be satisfied that the individual would, by the proposed public work, receive a benefit to the full value of the property taken, it could not be said to be a just compensation to give him the full value. [Emphasis supplied.]

Id. at 569-70.

It is recognized, of course, that in a great number of eminent domain proceedings "fair market value" will be equivalent to "just compensation" because the Government is taking all of an individual's property and the benefits/damages adjustments will not be applicable. But, where partial takings are involved, offsetting benefits and additional damages are subtracted or added, mutatis mutandis, to the fair market value and in such situations the fair market value of the land or interests therein is not equivalent to the payment of just compensation for the taking.

The "before and after" test is not, as appellant suggests, a method of determining "fair market value" but rather is a tool used in determining "just compensation." The advantage of the "before and after" test in determining just compensation for easements and rights-of-way is that it obviates the need for going through a complex procedure of first valuing the fair market value of the land or interest actually taken and then adjusting for consequential damages and offsetting benefits. Rather, in recognition that the purpose of just compensation is to make the landowner whole, it simply evaluates the value of the land to the owner prior to the appropriation and after the appropriation. Any diminution in value is the amount by which the owner has been damaged by the taking and for which he is properly compensated. This figure is not, however, the fair market value of the interest acquired, a point made crystal clear by the very record before the Board. 4/

One can scarcely read the data thus far developed relating to the private granting and leasing of linear rights-of-way without arriving at the conclusion that the United States has, for a considerable period of time,

4/ For the reasons which I have set forth, I think the Department might be well advised to totally abandon the UAS as a guide for determining charges for the use of public lands. See 602 Departmental Manual 1.3. Since I believe that it can be clearly demonstrated that the just compensation value required by the Fifth Amendment is not the same as the fair market value return mandated by numerous laws which the Department administers, I believe that continued reliance on the principles used to determine just compensation is obviously ill-advised.

grossly undervalued the rights-of-way it has granted across the public land. I recognize that appellant has objected to these on the grounds that the overwhelming majority of these grants involved situations in which one side possessed the power of eminent domain. I do not think that this is the proper time in which to exhaustively explore this argument, though I would point out that, various judicial suppositions to the contrary notwithstanding, 5/ the mere existence of eminent domain authority in the buyer will, insofar as deviations from fair market value are concerned, tend to make the price paid low rather than high.

While I recognize that a buyer might well be willing to pay more in order to avoid a lawsuit, this is merely an aspect of relative bargaining power. In other words, a purchaser is not willing to pay more than fair market value simply because he possesses eminent domain authority. Rather, he may be willing to pay more because he has a particular need for the land, a need which exists independent of whether or not he can condemn the land should the owner prove recalcitrant. Indeed, the purchaser who can also condemn, if he must, is in a far better bargaining position than the individual who needs must negotiate. For should the seller seek to overreach, the former always has recourse to his suit in eminent domain where the seller will be limited to just compensation, whereas the latter is left to his wiles and his pocketbook. The power to exercise eminent domain thus serves to set a ceiling price to the amount by which a greedy seller can overreach, a ceiling often absent in other negotiations. 6/

This is not to say that disparity in bargaining power can be safely ignored. All sales, regardless of the existence in one side of eminent domain authority, must always be examined to ascertain whether the price agreed upon has been affected by inequality of bargaining power, and adjusted accordingly. Sales made to those possessing condemnatory authority should certainly be so scrutinized. But I think it sufficient for the present to note that, notwithstanding appellant's assertions, the disparity in value received by the Government from that obtained by private citizens is probably greater than the present figures would suggest.

Thus, my concurrence in our remand herein is not occasioned by any doubt that a going rate approach is permissible. I do, however, agree that the record could be further developed on the question of the proper adjustments to be made to private sales which serve as the data pool necessary for implementation of the going rate approach. In this, I concur with the majority view that we cannot affirm a mixed-bag of approaches yielding disparate results which vary from State office to State office. Rather, it is

5/ See, e.g., Transwestern Pipeline Co. v. O'Brien, 418 F.2d 15 (5th Cir. 1969).

6/ It is recognized, of course, that in the absence of eminent domain authority in a purchaser, a seller may so overreach himself as to make the buyer look elsewhere. But, depending upon the need of the buyer, this is likely to occur at a more elevated price than the total cost of court fees and just compensation, particularly since all sellers are aware that should they force a buyer to commence a suit in eminent domain any return which they ultimately receive will, itself, be effectively diminished by their own court costs.

BLM's obligation, which it is attempting to fulfill through its task force and notice of intent to propose rulemaking, to devise a unified approach that (1) fairly determines the market value of the rights which the Government is granting by examining private transactions in the market place, (2) quantifies any dissimilarity between the bundle of rights granted by the United States and that normally given by a private landowner, and (3) derives a value which represents a fair return to the citizens of the United States for the use of the public lands as mandated by the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1701 (1982).

Until such time as this approach can be finalized, I agree that BLM should not attempt to readjust existing rights-of-way upon the running of each 5-year period. See 43 CFR 2803.1-2(d)(1), 2883.1-2. Rather, BLM should inform holders of rights-of-way that they will be notified in the future of the increased rental assessment, which will be retroactive to the commencement of the 5-year period, though the holders will be required only to tender rentals at the old rate until so notified. Upon notification, of course, any holder may, if he deems the charge excessive, appeal to this Board, and ultimately, the Federal courts. Upon a final determination of the fair market value, the holder should be called upon to pay the accrued principal with interest to bring his account to good standing. Such an approach is fair both to BLM, which must obtain fair market value, and the holders of rights-of-way who, by their continued occupancy, exhibit their agreement to pay fair market value while reserving their rights to object to a specific assessment on the grounds that it does not represent such fair market value.

In light of the above, I concur in the remanding of the instant cases.

James L. Burski
Administrative Judge